IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

BRUCE J. TERRIS,
SUELLEN T. KEINER,
1908 Sunderland Place, N.W.
Washington, D. C. 20036
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-73A) is reported at 514 F.2d 856. The order of the court of appeals of June 17, 1974, denying respondents'

motion for injunction pending appeal (Resp. App. A, pp. 1a-3a, *infra*) is not reported. The order of the court of appeals of January 3, 1975, granting a temporary injunction pending appeal (Pet. App. B, pp. 75A-80A) is reported at 509 F.2d 533. The order of the court of appeals of November 7, 1975, denying the federal petitioners' motion to dissolve the temporary injunction (Resp. App. B, pp. 4a-5a, *infra*), is not reported. The order of the court of appeals remanding the case to the district court for supplemental findings (Pet. App. C, pp. 81A-83A) is not reported.

The opinion of the district court (Pet. App. D, pp. 85A-101A), its supplemental findings of fact (Pet. App. E, pp. 103A-116A), and its order of November 14, 1975, granting respondents' motion to modify the temporary injunction (Resp. App. C, pp. 6a-7a, *infra*), are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F, pp. 117A-118A) was entered on June 16, 1975. By order dated September 3, 1975, Mr. Justice Rehnquist extended the time for the federal petitioners to file a petition for a writ of certiorari to and including October 10, 1975. By order dated September 9, 1975, Mr. Justice White extended the time for the American Electric Power System *et al.* (hereafter "the power company petitioners") to file their petition for a writ of certiorari to and including October 10, 1975. The petitions for writs of certiorari were filed on October 9 and 10, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") permits federal agencies to take numerous major federal actions related to the massive development

of coal resources in the Northern Great Plains without first preparing and considering a regional environmental impact statement related to the cumulative environmental impacts of federal actions within the entire region.

2. Whether this case is in a proper posture for review by this Court since the court of appeals has made an interlocutory decision remanding the case to the district court for further proceedings to determine issues of both fact and law.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, is set forth in the federal (p. 3) and power company (p. 3) petitions.

STATEMENT

Respondents brought suit on June 13, 1972, in the District Court for the District of Columbia seeking a declaratory judgment, mandamus and injunctive relief against the federal petitioners relating to the development and exploitation of the vast coal reserves of the Fort Union and Powder River formations located in eastern Montana, northeastern Wyoming, western North Dakota and western South Dakota—the Northern Great Plains region. The federal actions which respondents sought to enjoin include issuing, granting or approving coal prospecting and exploitation permits, coal mining leases and mining plans, water options and contracts, diversions of water from and placement of structures in navigable waterways and permits for rights-of-way.

The federal petitioners have already taken numerous actions related to coal development in the Northern Great Plains region. Fourteen federal coal leases, issued prior to the effective date of NEPA, are currently being strip-mined under federally approved mining plans. Pet. App.

A, p. 5A, note 4. Since January 1, 1970, when NEPA took effect, 29 additional coal leases, covering 137,802 acres, have been issued, 97 prospecting permits (which convey the right to obtain leases) covering 685,280 acres have been granted, and water-option contracts for 601,000 acre-feet of water per year have been issued. Answers of Secretary Morton to Plaintiffs' Interrogatories, Exhibit C, App. 49-50; Supplemental Answers of Secretary Morton, App. 149-156; Exhibit 1 to Federal Defendants' Motion for Summary Judgment, App. 173-188. Five mining plans which authorize strip-mining have also been approved. Pet. App. A, p. 10A, note 13.[1]

Meanwhile, the federal petitioners have received applications for approval of 16 other mining plans. *Id.* at 10A-11A. The Secretary of the Interior has announced that he would approve four of these mining plans for four additional mines in northeastern Wyoming if he were not presently enjoined from doing so. Affidavit of Thomas S. Kleppe, para. 14, attached to petitioners' Application for a Stay Pending Review on Writ of Certiorari. The federal defendants also have pending 42 competitive lease applications, 82 preference right leases, 19 applications for coal-related rights-of-way, 41 applications for water option contracts, and two applications for permits for structures in navigable rivers. Pet. App. A, pp. 8A-9A, including notes 7, 8 and 9, 12A-13A.

Respondents claimed that the federal petitioners had violated in the past, and were continuing to violate, Sections 102(2)(A), (C) and (D), 42 U.S.C. 4332(2)(A), (C) and (D), of NEPA by taking these actions related to coal development in the Northern Great Plains region without preparing and considering a regional environmental impact statement, systematic interdisciplinary

[1] In addition to the mining plan approvals mentioned in the court of appeals' opinion, the Secretary of Interior approved the Amax mine in northeastern Wyoming in November 1975.

studies and a study of appropriate alternatives concerning the cumulative environmental impacts of the numerous federal actions relating to coal development in this area. Respondents contended that the environmental impacts of the massive coal development in the Northern Great Plains would be enormous. Presently, the Northern Great Plains region is a largely uninhabited agrarian region with majestic unspoiled vistas, large isolated areas devoted to ranching or recreational uses, and abundant wildlife. The projected development of the region's coal resources will permanently destroy much of the region's environment by converting it into a major industrial complex. The large strip mines, mine-mouth electric and coal gasification plants, railroads, aqueducts, transmission lines and other installations related to this coal development will cause an enormous, adverse impact on land use, water supply, water and air quality, wildlife, aesthetics and other elements of the environment.

For example, it has been variously estimated that the land to be stripmined for this coal development will cover from 30 square miles per year—or a total of more than 1000 square miles during the development's projected 35-year duration—to more than 3000 square miles in northeastern Wyoming alone. The record below contained documents which show that no strip-mined land has yet been fully reclaimed and that the region's climate, scarce water supply, and thin topsoil make it extremely unlikely that any of it will be successfully reclaimed. Montana Coal Task Force, Coal Development in Eastern Montana, p. 33 (1973); Melcher, Review and Analysis of Phase I Report of North Central Power Study, pp. 12, 20-21 (1972); Montana Environmental Quality Council, First Annual Report, p. 143 (1972). A federal inter-agency task force has stated that "acceptable reclamation of these semi-arid lands has yet to be demonstrated." Sulfur Oxide Control Technology Assessment Panel, Final Re-

port on Projected Utilization of Stack Gas Cleaning Systems by Steam-Electric Plants, p. 69 (April 1973). The Bureau of Land Management has recognized the adverse environmental impacts of this coal development in just the Powder River basin in Wyoming (Bureau of Land Management, Burlington-Northern Inc. Environmental Analysis Record: Proposed Railroad, Douglas to Gillette Wyoming (August 1973) pp. 2, 5, 7-8):

> About 21 billion tons [of coal] are strippable with 16 billion tons being on the east side of the basin in what is known as the Wyodak zone. This Wyodak zone outcrops and extends south for approximately 90 miles from a point about 20 miles north of Gillette which if developed for coal can result in a total disturbance in excess of 200,000 acres.
>
> • • • •
>
> This procedure of [strip] mining will totally disrupt the existing ecosystem. Rehabilitation of this type of practice will not approach restoration.
>
> • • • •
>
> The resultant boom with its enormous population pressures may cause more human resource problems than the ecological damage of strip mining itself.
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> • • • •
>
> C. Adverse Impacts That Cannot Be Avoided:
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> • • • •
>
> *The Overall Impact:* The total impact of enabling the proposed railroad line for coal development will transform large areas of the Powder River Basin into an abnormal, imbalanced ecosystem. Both plant and animal species, in disturbed areas will be either eradicated completely, displaced, or temporarily eliminated. Air and water quality will be lowered by material carried in suspension. The visual and noise pollution will continue until the energy resources are depleted. It is doubtful that the human

> impact as mentioned under impacts can be completely mitigated.

Moreover, toxic mining spoils threaten to pollute ground water supplies and the removal of coal formations which have served as the area's principal aquifers threatens to reduce the supply of ground water significantly. Montana Environmental Quality Council, First Annual Report, *supra*, pp. 143-144.

The irreparable environmental damage to the region is well-summarized by the court of appeals (Pet. App. A, p. 3A):

> In addition to the obvious environmental effects of strip-mining acres of now-fertile land, development would also affect the region's water supply and quality, air quality, wildlife, population distribution and composition, and economic structure. These effects would be caused not only by the mines themselves, but by the power plants, coal gasification plants, railroads, aqueducts, pumping plants, reservoirs, dams, and new housing that would necessarily accompany the strip mines.

On February 14, 1974, the district court granted the motions of the federal and power company petitioners for summary judgment. It concluded, *inter alia*, that since the federal petitioners had decided not to develop a regional program or plan for their numerous actions related to development of the coal resources in the Northern Great Plains, NEPA did not require that they prepare a regional environmental impact statement. Pet. App. D, pp. 98A-99A.

On June 17, 1974, the court of appeals denied the respondents' motion for an injunction pending appeal because the requested injunction was too broad. However, the court noted that "the spectre of significant harm to large tracts of valuable wilderness still remains" and

urged that the federal petitioners exercise "substantial restraint" in approving coal development activity in the Northern Great Plains while the appeal was pending. Resp. App. A, pp. 2a-3a, *infra*.

After a *sua sponte* remand to the district court for the record to be updated and certain factual questions answered (Pet. App. C, pp. 81A-83A; Pet. App. E, pp. 103A-116A), the court of appeals heard oral argument on December 17, 1974. On January 3, 1975, it granted respondents' motion for a limited injunction to prevent the imminent approval of four mining plans and railroad rights-of-way. Pet. App. B, pp. 75A-80A.

On June 16, 1975, the court of appeals issued its decision on the merits of the case. The court held that the federal petitioners, by exercising their power to approve leases, mining plans, rights-of-way and water options, were attempting to control development of coal resources in the Northern Great Plains which constituted major federal action within the meaning of NEPA (Pet. App. A, p. 39A). However, as to the proper timing for a regional impact statement, it remanded the case to the district court for the federal petitioners to decide whether such a statement would be prepared and to apply a four-factor balancing test in deciding whether the time was ripe for a statement. *Id.* at 43A-44A. At the same time, the court of appeals continued the temporary injunction of January 3, 1975, in order to "preserve, in large part, the *status quo*" pending the federal petitioners' decision whether to prepare a regional environmental statement. *Id.* at 50A-51A.

On November 7, 1975, the court of appeals denied the motions of the federal and power company petitioners to dissolve the temporary injunction and, at the same time, remanded to the district court respondents' motion to modify that injunction in order to prevent approval of

the mining plan for the Amax mine in the Eastern Powder River Coal Basin. Resp. App. A, pp. 4a-5a, *infra*. On November 11, 1975, the Secretary of Interior decided that the Amax mining plan should be approved. On November 14, 1975, the district court enjoined that approval insofar as it extended beyond a period of two years or the final resolution of this litigation. Resp. App. C, pp. 6a-7a, *infra*.

ARGUMENT

Since this case involves massive development of coal resources in a large area of four states, there can be no question that it is of substantial importance. However, the interlocutory nature of the court of appeals' decision and narrow legal issues that are presented make this case inappropriate for review by this Court at the present time. Rather, the problems of energy development and environmental protection which are presented here can be resolved most expeditiously if the case is allowed to proceed on remand to the district court, as contemplated by the court of appeals. Pet. App. A, pp. 44A, 47A-50A.

1. The federal petitioners' contention that the decision of the court below is in conflict with *SCRAP* v. *United States*, 422 U.S. 289 (1975) ("SCRAP II"), is based on obvious and serious misstatements of the holding of the court of appeals. In SCRAP II, this Court held that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal actions" (emphasis in original). The federal petitioners' claim that the decision below is in conflict with SCRAP II rests upon their repeated characterization (Pet. 11, 14, 15, 17, 18, 19) of that decision as holding that preparation of an environmental impact statement is required whenever federal officials are merely "contemplating" certain action

and that a statement "must precede" a proposal for major federal action.

In fact, the court of appeals held (Pet. App. A, p. 42A):

> We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus we think it proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe. * * * We should note, however, that the "ripeness" necessary before a statement is required is slight. *Preparation of a statement must precede, or at least accompany, preparation of the recommendation of report on the proposal,* so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action. (emphasis added).

Subsequently, the court reaffirmed its holding: "[A]s we have made clear, a comprehensive EIS *should accompany* the proposal for action * * *" (emphasis added). *Id.* at 48A. Thus, the court of appeals' ruling is based directly on the requirement of Section 102(2)(C) of NEPA that an environmental impact statement be prepared to "accompany the proposal [for major federal action] through the existing agency review processes." 42 U.S.C. 4332 (2)(C). It is also obviously consistent, indeed almost identical, with the holding of this Court in SCRAP II that an environmental statement must be prepared when the agency "makes a recommendation or report on a *proposal* for federal action."

Moreover, the issue of whether, in the circumstances of the present case, the time is yet "ripe" for a re-

gional impact statement to be required was not decided by the court of appeals. Instead, it was specifically left open to be resolved upon remand, first by the federal petitioners and, if they decide not to prepare a statement, by the district court. The district court was directed to consider four factors (Pet. App. A, p. 43A):

> How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?

These four factors relate directly to this Court's holding in SCRAP II that the kind and timing of an environmental impact statement depends on the circumstances of a particular case.

Furthermore, the facts in this case are significantly different than those in SCRAP II. This case arises in the midst of a large number of federal actions concerning coal development in the Northern Great Plains region. Many federal approvals of coal leases, prospecting permits, mining plans, water options and rights-of-way have already been made and numerous additional applications are currently awaiting federal action. The federal petitioners have already prepared numerous studies and reports attempting to control development of coal resources in the Northern Great Plains. See Pet. 5-6; Pet. App. A, pp. 5A-7A. These studies culminated most recently in the Interim Report of the Northern Great Plains Resource Program (hereafter NGPRP Report),[2] a federal-state inter-agency study begun in June 1972 and designed "to coordinate on-going activity and build a policy

[2] Respondents are lodging the report with this Court.

framework which might help guide resource management decisions in the future." *Id.* at 6A.

2. The federal petitioners claim (Pet. 16-17) that there is a conflict among the circuits concerning the issue of appropriate scope for an environmental impact statement. The weakness of petitioners' claim of conflict is reflected by the fact that they cite six separate cases but do not discuss any in sufficient detail to show whether a conflict actually exists. We submit, on the contrary, that a careful reading of these cases and of other cases involving the appropriate scope of an environmental statement will show that all of these cases, like the decision below, depend on their particular facts.

For example, the federal petitioners claim a conflict between the decision below and *Chelsea Neighborhood Ass'n* v. *United States Postal Service*, 516 F.2d 378 (C.A. 2, 1975). However, in that case the court rejected an environmental statement as inadequate because it did not contain certain comprehensive analysis. The court below cited another Second Circuit decision which supports the principle of comprehensive environmental statements. *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F.2d 927 (1974), vacated and remanded for reconsideration, —— U.S. ——, No. 74-1413. Even more recently, the Second Circuit has again held an environmental statement invalid because of its limited scope. *Natural Resources Defense Council* v. *Callaway*, —— F.2d ——, 8 ERC 1273 (1975). Thus, the Second Circuit cases all support the decision of the court below and certainly do not conflict with it.

Petitioners cite three Ninth Circuit cases, *Daly* v. *Volpe*, 514 F.2d 1106 (1975), *Friends of the Earth* v. *Coleman*, 518 F.2d 323 (1975), and *Trout Unlimited* v. *Morton*, 509 F.2d 1376 (1974), where the Ninth Circuit ruled that broad environmental statements

were not required and approved statements covering only individual phases of larger projects. However, more recently, in *Cady* v. *Morton*, —— F.2d ——, 8 ERC 1097, 1101-1102 (1975), the Ninth Circuit required a broad, lease-wide impact statement and rejected a single mining plan statement as inadequate in scope. These cases, where the same Circuit has held that a broader environmental impact statement is or is not required, show clearly that this determination depends largely on the particular facts of a case.

Moreover, the decisions which petitioners cite show even in isolation how much they depend on their own particular facts. *Trout Unlimited* v. *Morton*, *supra*, and *Sierra Club* v. *Callaway*, 499 F.2d 982 (C.A. 5, 1974), depend heavily on the fact that Congress had separately approved and authorized funding for each project at issue in those cases. In *Sierra Club* v. *Stamm*, 507 F.2d 788 (C.A. 10, 1974), the court did not require a broader environmental statement because the overall project would not be completed until sometime in the next century and there was a clear commitment to prepare environmental statements on other components of that project. On the other hand, in *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11 (C.A. 8, 1973), the court of appeals required the preparation of an environmental statement broader in scope than that which the federal agency had prepared although narrower than the plaintiffs desired. The particularized nature of a determination concerning the proper scope of an environmental statement was pointed out by this Court in SCRAP II, *supra*: "In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken."

Even if it could be said that there was a conflict between the legal principles in the decision below and cases in other circuits, such a conflict would be inappropriate

for resolution at this time. As we will discuss, the decision below is interlocutory and will require detailed findings of fact on remand to apply the principles laid down by the court of appeals to the facts of this case. Until the legal principles are applied to the facts, it is impossible to ascertain whether the decision below is in conflict with any other case.

Moreover, any alleged conflict of circuits is of little importance for future cases in view of the determination of the Department of the Interior to prepare regional environmental statements in the future. The federal petitioners have recently acknowledged that regional environmental impact statements are necessary in order "to look at both specific individual actions and their cumulative impacts." Statement of George L. Turcott, Assistant Director, Bureau of Land Management, Hearings on the Administration of the National Environmental Policy Act of 1969 before the Subcommittee on Fisheries, Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess., September 8, 1975, p. 9. To "illustrate the possible use of regional program EIS," Mr. Turcott stated (*id.* at 8):

> There are many existing and proposed energy-related projects in the three-State area of Montana, North Dakota, and South Dakota. These include coal mining, coal gasification, power plants, water developments, transportation systems, pipelines, and transmission lines. These projects, to the extent Federal actions are involved, must meet NEPA requirements for environmental assessment and EISs.

3. The federal petitioners entirely ignore the fact that the decision of the court below is squarely based on the positions of the principal environmental agencies of the federal government. Both the Council on Environmental Quality and Environmental Protection Agency have con-

cluded that a regional environmental statement for the Northern Great Plains is needed for responsible decision-making and is required by NEPA.

The Guidelines of the Council on Environmental Quality provide (40 C.F.R. 1500.6(d)(1)) that "broad, program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases) * * *." On December 28, 1973, a memorandum from the Chairman of the Council on Environmental Quality described how the Department of Interior was violating the National Environmental Policy Act concerning coal development in the Northern Great Plains region in numerous respects and stated that "the important requirements for adequate environmental analysis" required, *inter alia* (Addendum A to Appellants' Reply Brief in the court of appeals, p. A-5):

> Preparation of a draft "coal development program environmental impact statement" encompassing the regional and secondary impacts of coal development on Federal and Indian lands in the Northern Great Plains.

On January 15, 1974, the Chairman of the Council sent that memorandum to the Secretary of Interior with his own letter which stated (*id.*, p. A-1):

> An extensive amount of coal is already committed for development—in the form of outstanding leases and pending applications for preference right leases—and the Council believes that this pending development must be given timely and careful examination, as required by NEPA.

Just recently, in a "Memorandum to the Heads of Agencies" dated November 26, 1975, the Chairman of the Council on Environmental Quality explained this Court's decision in SCRAP II and pointed out (p. 4):

> Agencies which sponsor incremental actions with cumulative significant impacts (e.g., individual coal leases or highway segments) should continue the practice of preparing program statements covering the cumulative environmental effects of the broader programs, as prescribed in Sec. 1500.5 of CEQ's Guidelines.

The Environmental Protection Agency has likewise concluded that the National Environmental Policy Act requires preparation of a comprehensive environmental impact statement before federal actions can be taken concerning coal development of the Northern Great Plains region. In identical letters to Secretaries Morton and Butz, the Administrator of EPA stated (App. 82; Pet. App. A, p. 37A, note 28):

> Environmental impact statements prepared on a project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and spirit of the National Environmental Policy Act.

4. The federal petitioners rely on the fact that a number of environmental impact statements have been prepared relating to the coal development in the Northern Great Plains. However, as the court of appeals pointed out (Pet. App. A, pp. 10A-11A, note 15), no claim has ever been made in this case that any of these statements even purports to analyze the cumulative environmental impacts of coal development in the region of the Great Plains.

The Coal Programmatic Impact Statement (see Pet. 4 and note 1), which considers federal leasing policy for the entire country, analyzes only coal leasing and none

of the other federal actions—prospecting permits, rights-of-way, water options, etc.—related to coal development. The Eastern Powder River Coal Basin environmental statement (see Pet. 8) considered only four mining plans and railroad rights-of-way in a portion or northern Wyoming. Neither environmental statement even purports to be a regional analysis of the total effects of, and alternatives to, coal development.

Consequently, the federal petitioners specifically told the court of appeals that both of these statements were irrelevant to the present case. When the federal petitioners lodged these draft statements in the court of appeals, the court asked the federal petitioners to explain their significance to this litigation. Letter of Robert A. Bonner, Chief Deputy Clerk to Edmund B. Clark, Department of Justice, September 13, 1974. The government replied (Supplemental Memorandum of the Federal Appellees, September 27, 1974):

> We call the Court's attention only to the existence of these draft impact statements. Because *the contents of the statements are not relevant*, there is nothing missing from the statements that could be relevant in any respect to this case. (emphasis added)

Contrary to the claim of the federal petitioners (Pet. 7), they have not prepared environmental statements on all major federal actions relating to coal development in the Northern Great Plains. On the contrary, there have been at least 29 federal coal leases issued in the region since January 1, 1970, and not a single environmental statement has been prepared. This failure is a plain violation of NEPA. See *Cady* v. *Morton*, *supra*, 8 ERC at 1100. Not a single environmental statement has been prepared on any of the 97 prospecting permits or the numerous water-option contracts which conveyed rights

to hundreds of thousands of acre feet of water in federal reservoirs to private companies. The few other environmental statements relating to the region have involved individual mining plans.

None of the basic regional issues underlying the past and proposed federal actions concerning coal development in the Northern Great Plains has ever been analyzed in any environmental impact statement:

> (1) whether low heat-value western coal is cheaper or more expensive when delivered to utilities in the mid-west and other areas than higher heat-value midwestern and eastern coal;
>
> (2) whether strip mining and energy-production facilities should be allowed throughout the Northern Great Plains region or should be concentrated in one or a few areas within the region in order to limit the area of environmental harm;
>
> (3) whether strip mining should be restricted to areas in the region where the chances of reclamation are best;
>
> (4) whether it is feasible to deep mine the coal in the region;
>
> (5) whether conversion to electricity or gas should be done within the region or the coal should be transported to the place of use;
>
> (6) whether transportation of coal out of the region is preferable by railroad or slurry pipeline; and
>
> (7) how scarce water supplies should be allocated between agriculture, fish and wildlife, various kinds of energy developers and other users.

Moreover, none of these environmental statements considers the cumulative impact of development. This impact may be drastically different than the impact of a

single project considered in isolation. As the NGPRP Report said (p. 117):

> Is the impact of two mines or power plants in the same area twice as great as the impact of one, is it larger, or is it smaller?
>
> • • • •
>
> It is quite possible that the impacts resulting from the assumed coal development profiles in the NGP may be greater than the projection and analytic techniques used have been able to delineate.

The court of appeals suggested two other situations where the cumulative environmental impacts would be significantly different (Pet. App. A, p. 38A, note 28):

> To cite two examples beyond those suggested above, the availability of water and manpower in the Region is limited. Coal mining is crucially dependent upon both. Thus development of one mine is considerably more than an irretrievable commitment to that mine. In the case of water supply, it forecloses the possibility of another, environmentally preferable mine. In the case of manpower, it creates pressure for a population influx which, while minor for one mine, may be cumulatively considerable.

5. The federal petitioners claim (Pet. 18-19) that they have complete discretion to determine the appropriate region for the preparation of an environmental impact statement and the exercise of this discretion should be overturned only if arbitrary, capricious, or an abuse of discretion. They then claim that the environmental impact statement on the Eastern Powder River Coal Basin was an appropriate area on which to do a regional statement. However, as we have noted, the federal petitioners informed the court of appeals that the Eastern Powder River statement was unrelated to the issues in this case. They clearly cannot claim for the first time in this Court that the Eastern Powder River state-

ment constitutes a regional statement meeting the requirements of the court of appeals. Even if they can make this contention at such a late date, it raises complicated issues of fact which should be initially resolved by the courts below.[3]

The federal petitioners also suggest (Pet. 19, note 17) that the region described by the court of appeals was chosen by the respondents. This suggestion is simply frivolous. The area described in the complaint is the physical area encompassed by the Fort Union and Powder River coal formations and was taken from documents of the federal petitioners themselves. This area had been repeatedly described, prior to the filing of the complaint, by the Administrator of EPA and the Secretaries of Interior and Agriculture as the appropriate region for federal studies. Pet. App. A, pp. 35A-38A. Subsequently, the federal petitioners' own detailed study of the coal development, the NGPRP Report, covered 63 counties in northwestern Wyoming, eastern Montana, and the western Dakotas (p. 3 and Plates A-3, B-4, B-5 and B-6), the exact same area described in the complaint. Thus, whatever dispute might arise in some other case concerning the appropriate area for a regional statement, there can be no dispute that the identical region described in the complaint, the court of appeals' opinion and the federal petitioners' own documents is the appropriate one here.

6. As the federal petitioners correctly observe (Pet. 10, note 12), the court of appeals' decision here is interlocutory and does not constitute a final resolution of the

[3] We further note that even if, after resolution of the issues of fact, the Eastern Powder River statement was held to constitute an adequate regional statement, it obviously cannot justify proceeding with any federal decisions in the other areas of the Northern Great Plains in Montana, the Dakotas and even parts of northeastern Wyoming outside the Eastern Powder River Coal Basin.

legal and factual issues in this case. Instead, the court of appeals found that it was unclear whether the time was ripe for a regional environmental statement to be required under NEPA (Pet. App. A, pp. 47A-48A) and remanded that issue to the district court for the federal petitioners to decide whether they would prepare such a statement and what the federal role in region would be (*id.* at 48A-50A). If the government decides not to prepare a statement, the district court will then decide whether, under the general standards laid down by the court of appeals (*id.* at 43A), the time is ripe for requiring a regional environmental statement under NEPA (*id.* at 44A). This determination will presumably be made after the parties have had an opportunity to supplement the existing factual record concerning matters which have occurred since the case was last before the district court in the fall of 1974. Thus, a final judgment on the merits of this case has not been reached but awaits action by the government and further findings by the district court.

The present case clearly falls within this Court's rule that a case which has been remanded by the court of appeals is "not yet ripe for review." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967). In the absence of some exceptional reason, this Court will not usually grant a petition for a writ of certiorari to review a non-final judgment. Stern and Gressman, Supreme Court Practice, Sec. 4.19, p. 180 (4 ed. 1969). Thus, in *American Construction Co.* v. *Jacksonville T. & K.R. Co.*, 148 U.S. 372, 384 (1893), the Court ruled that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Similarly, in *Hanover-Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-

409 (1916), the Court held that such a lack of finality "of itself alone furnished sufficient ground for denial" of a petition for a writ of certiorari. See also *Hamilton Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251 (1916).

We submit that petitioners have failed to show that this case meets any of these criteria for interlocutory review. They have shown no "exceptional reason" nor any "extraordinary inconvenience" which requires that the decision of the court of appeals be reviewed at this time rather than allowing the case to proceed upon remand to the district court.

Respondents agree with the federal petitioners (Pet. 21) that "[i]t is not necessary to suspend development of coal resources [in the Northern Great Plains] for several years." However, we submit that the expeditious resolution of this case depends entirely upon the federal petitioners' own actions. Despite acknowledging the need for comprehensive regional analysis since 1972 (see pp. 15-16, *supra*), they have delayed in preparing such studies and have continually relied upon legal arguments to avoid this requirement.

The Interim Report of the NGPRP constitutes a substantial basis for preparing a regional environmental impact statement. If the federal petitioners begin today to prepare a regional statement on the basis of that report, it would probably be completed as soon as, or almost as soon as, this Court reaches a decision on the merits. Consequently, such a statement would not only provide the best possible assurance that federal actions will protect the environment of the region as far as possible, but also would not significantly delay the federal petitioners' decisions concerning development of the region.[4]

[4] The preparation of a regional impact statement has recently been urged by the governors of Montana, Wyoming, North Dakota, South Dakota and six other western states, who compose the Western Governors' Regional Energy Policy Office. On October 29, 1975, they unanimously adopted a resolution)Resp. App. D, pp. 8a-9a, *infra*) which urges all parties to the present litigation to reach a negotiated settlement that would include, *inter alia*, preparation of a "comprehensive regional plan for energy development in the Northern Great Plains" by the federal petitioners. The governors also urged that the court of appeals' temporary injunction be continued to prevent federal activities in the region until such a plan is completed.

We therefore submit that the public interest will best be served if certiorari is denied so that the federal petitioners turn their attention to the detailed regional analysis which they themselves have often admitted is essential.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

BRUCE J. TERRIS,
SUELLEN T. KEINER,
Attorneys for Respondents

DECEMBER 1975

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civil Action No. 1182-73

No. 74-1389

SIERRA CLUB ET AL.,
Appellants

v.

ROGERS C. B. MORTON, SECRETARY OF THE
UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

Before Tamm and Leventhal, Circuit Judges

ORDER

This case is before the Court on appellants' motion for an injunction pending appeal and for expedited hearing, and the responses thereto.

Federal appellees are responsible for the issuance of coal prospecting permits and coal mining leases, the approval of strip mining plans and the granting of water options and right-of-way over federal lands and waterways (hereinafter referred to collectively as "coal development activities"). Appellants' complaint sought a declaratory judgment that federal appellees are violating Section 102(2) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2), by authorizing coal development activities in an area appellants denominate the "Northern Great Plains Region" without first preparing and considering a comprehensive state-

ment of the cumulative environmental impact of appellees' actions as a whole on that Region. The complaint also prayed for an injunction against any further actions by appellees in furtherance of coal development in that Region until such a comprehensive environmental impact statement was prepared. As defined by appellants, the "Northern Great Plains Region" is comprised of eastern Montana, northeastern Wyoming and the western portions of the Dakotas.

On February 28, 1974, the District Court granted summary judgment and judgment on the pleadings in favor of federal appellees and intervening appellees and an appeal was noticed. Appellants' motion for an injunction pending appeal was denied by the District Court on March 26, and is now renewed before this Court. It appears that appellants seek an injunction as broad in scope as that requested in the complaint below, i.e., a stay of all actions by the federal appellees authorizing any coal development activity in the "Northern Great Plains Region."

The papers before this Court are ambiguous or silent as to certain dispositive facts, such as the exact nature of the various environmental studies pending before the federal appellees, whether those studies have been issued, what actions will be taken by the federal appellees before completion of those studies, whether any applications for coal development activities are now before the appellees, and when such applications may be approved. Without adequate knowledge of these facts, we are reluctant at this time to grant the broad injunctive relief requested by the appellants.

Despite this uncertainty, the spectre of significant harm to large tracts of valuable wilderness still remains. We are concerned lest the federal appellees approve applications for coal development activity in the "Northern

Great Plains Region" allowing consequential and perhaps irreversible action to be taken before this appeal is decided. The validity of any such approval turns on an issue of substantial public importance presented by this appeal, i.e., whether a comprehensive environmental impact statement, encompassing all of the federal appellees' actions relating to coal development activity in that Region is presently required. To the extent that these appellees consummate any such action pending the appeal, our jurisdiction to decide that issue as to those actions may be defeated.

The Court accordingly urges that substantial restraint be exercised in the granting of authority for coal development activity pending a disposition of this case on its merits.

The motion to expedite appeal is granted to the extent that the case will be set for hearing on the September calendar of the court. Counsel shall agree to, and submit to the court, a briefing schedule which provides for the filing of final briefs no later than August 20, 1974.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civil Action No. 1182-73

No. 74-1389

SIERRA CLUB ET AL.,
Appellants

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

Before: BAZELON, Chief Judge, and WRIGHT and MACKINNON, Circuit Judges

ORDER

On consideration of appellants' motion to modify the temporary injunction filed January 3, 1975, and the cross-motions of the federal and intervening appellees to dissolve that injunction, it is

ORDERED by the court that appellants' motion to modify the injunction is hereby remanded to the District Court for consideration and disposition. *See Sierra Club* v. *Morton*, —— U.S.App.D.C. ——, ——, 514 F.2d 856, 883 (1975).

It is FURTHER ORDERED by the court that the cross-motions of the federal and intervening appellees to dissolve the injunction are hereby denied.

Per Curiam

For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

[Filed Nov. 14, 1975, James F. Davey, Clerk]

SIERRA CLUB, *et al.*,
Plaintiffs,

v.

ROGERS C. B. MORTON, *et al.*,
Defendants.

ORDER

This matter came before the Court pursuant to the Order of the Court of Appeals, dated November 7, 1975, remanding to this Court, for consideration and disposition, plaintiff-appellants' motion to modify the temporary injunction issued by the Court of Appeals on January 3, 1975, as well as on plaintiffs' motion for a temporary restraining order. In view of the Court of Appeals' existing injunction and it appearing to the Court from the pleadings and affidavits submitted by the parties that plaintiff-appellants' motion to modify the injunction should be granted to the extent indicated below, it is hereby

ORDERED:

(1) That, plaintiff-appellants' motion for a temporary restraining order is hereby denied;

(2) That, plaintiff-appellants' motion to modify the injunction of January 3, 1975, is hereby granted in that:

(a) The surface-mining operations of intervenor-defendant Amax Inc. are enjoined from continuing on federal lands, pursuant to the mining and reclamation plan for the Belle Ayr South mine approved by the federal defendants on November 11, 1975, for more than a period of two years commencing from the date of this order or until such time as a final decision on the merits of this case is rendered and it is otherwise decreed, subject to such terms and conditions as may be provided therein.

(b) During the period set forth in subparagraph (a) above, intervenor-defendant Amax Inc. may proceed with surface-mining operations at the Belle Ayr South mine pursuant to the federally approved mining and reclamation plan but is restrained from mining more than approximately 126 acres of land each year.

(c) The Secretary of the Interior is hereby enjoined from permitting surface-mining operations on federal coal lands pursuant to the mining and reclamation plan for the Belle Ayr South mine of Amax Inc., approved by the Secretary on November 11, 1975, beyond the period set forth in subparagraph (a) above.

SO ORDERED.

/s/ June L. Green
JUNE L. GREEN
United States District Judge

Nov. 14, 1975
Date

APPENDIX D

PUBLIC POLICY RESOLUTION 75-17

Albuquerque, New Mexico October 29, 1975

URGING NEGOTIATION OF ISSUES IN LAWSUIT OF SIERRA CLUB v. MORTON

WHEREAS, the Western Governors' Regional Energy Policy Office favors the orderly development of the region's energy resources as being in the best interests of the nation and our states; and

WHEREAS, such orderly development requires a comprehensive regional plan developed by the federal and state governments working as full and equal partners; and

WHEREAS, the potential judicial review of *Sierra Club* v. *Morton* will entail unnecessary procedural delays that may well never produce a coherent comprehensive regional plan; and

WHEREAS, limited development of our coal resources, in conjunction with the development of a comprehensive regional plan, will permit the nation's need for coal to be met while adequately protecting the environment, economy, and quality of life of our region and its citizens.

NOW, THEREFORE, BE IT RESOLVED that the Western Governors' Regional Energy Policy Office strongly urges all the parties of record to the lawsuit resolve it by negotiation, provided that any negotiated settlement include the following provisions:

1. The Department of Interior will initiate a comprehensive regional plan for energy development in the Northern Great Plains, including the states as equal partners in the development of such plan;

2. The parties agree to a continuation of the present injunction and the Department of Interior's policy of restraint until the comprehensive regional plan is completed, except in limited areas to be designated by the parties to the lawsuit, subject to approval by the governor of the state in which the area is located, or, if the governor of a state so requires, subject to compliance with state plant siting and reclamation laws by all energy developers within the designated areas;

3. Within the designated areas, energy development may proceed without regard to the injunction provided that it is done in compliance with federal and state laws, including any required site-specific environmental impact statements.

(This resolution is respectfully submitted to the Secretary of Interior of the United States and to the Sierra Club.)

Proposed by the State of Wyoming.

Adopted unanimously.

Western Governors' Regional Energy Policy Office, Inc.

Jerry Apodaca, Governor of New Mexico
Chairperson of the Board